

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MARVIN HAMMERMAN, OFFICER OF	:	DETERMINATION
WCD, INC./WOODEX DESIGNS	:	DTA NO. 812210
	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1987	:	
through November 30, 1990.	:	

Petitioner, Marvin Hammerman, officer of WCD, Inc./Woodex Designs, 111 East 30th Street, New York, New York 10009, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1987 through November 30, 1990.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on February 24, 1994 at 1:15 P.M. The Division of Taxation filed a brief on April 21, 1994. Petitioner filed a brief on May 18, 1994. The Division of Taxation filed a reply brief on June 15, 1994. Petitioner appeared by Norman R. Berkowitz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Mary Rinaldi Hurteau, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly estimated the sales and use tax liability of WCD, Inc./Woodex Designs.

II. Whether the Division of Taxation's adjustment of the assessment following the issuance of the statutory notices herein and the production of certain records was proper.

III. Whether, under the facts and circumstances herein, the Division of Taxation properly asserted personal liability against petitioner, Marvin Hammerman, pursuant to Tax Law §§ 1131(1) and 1133(a).

FINDINGS OF FACT

On January 28, 1991, following an audit, the Division of Taxation ("Division") issued to petitioner, Marvin Hammerman, individually and as officer of WCD, Inc./Woodex Designs, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which assessed \$112,625.77, plus penalty and interest, for the period December 1, 1987 through November 30, 1990.

Also on January 28, 1991, the Division issued to petitioner a second statutory notice which assessed \$11,262.58 in penalties under Tax Law § 1145(a)(1)(vi) for the same period.

The audit which resulted in the issuance of the above-noted assessments was commenced by the Division's mailing of an audit appointment letter dated December 28, 1990 to: "WCD, Inc./Woodex Designs, 1206 Second Avenue, New York, NY 10021." Said letter set an appointment date of January 17, 1990 at the taxpayer's place of business; indicated an audit period of December 1, 1987 through November 30, 1990; requested that all books and records of the business for the audit period be made available at that time; and further requested that the taxpayer contact the Division to confirm the appointment.

On December 28, 1990, the Division's auditor visited 1206 Second Avenue and determined that the store which apparently had been operating at that location was empty and that no business had been conducted from that location for some time.

The Division subsequently sought to locate the vendor/taxpayer using the telephone directory. This effort revealed that the business telephone number had been disconnected and that no forwarding information was available.

The Division then discovered that petitioner, Marvin Hammerman, was an officer of WCD, Inc. and mailed an audit appointment letter dated January 16, 1991 to WCD, Inc./Woodex Designs, care of Marvin Hammerman at his home address, 111 East 30th Street, New York, New York. Said letter was identical in content to the previous audit appointment letter except that it set an appointment date of January 28, 1991 at the Division's offices.

The Division received no response to either the December 28, 1990 or January 16, 1991

letters.

The tax assessed in the January 28, 1991 statutory notice for the period December 1, 1987 through February 28, 1990 was based upon gross sales figures as reported on sales tax returns filed for the same period by WCD, Inc./Woodex Designs. The Division determined that such gross sales constituted taxable sales and computed the tax due accordingly. In other words, the Division disallowed all sales claimed as exempt by WCD, Inc./Woodex Designs for the period December 1, 1987 through February 28, 1990.

Prior to the issuance of the statutory notices, no sales tax returns were filed by WCD, Inc./Woodex Designs for the period March 1, 1990 through November 30, 1990. The Division estimated a tax liability of \$10,366.53 for each of the three sales tax quarters comprising this portion of the audit period. The basis for this estimate is not contained in the record.

Subsequent to the issuance of the statutory notices and following a Bureau of Conciliation and Mediation Services ("BCMS") conference on January 10, 1992, the Division reviewed certain information made available by petitioner's accountant. Such information included sales invoices and the partnership returns of Woodex Designs. From the record, it appears that the Division received certain information in September 1992 and that an informal conference among the auditors and petitioner's accountant was held at the Division's offices in November 1992. The Division's review of such documents resulted in a revision of the assessment herein as follows:

	<u>Tax Due</u>
Additional Tax Due on Disallowed Exempt Sales	\$14,951.89
Difference of Sales Tax per Invoices and Amounts Paid per Returns	10,456.72
Tax Reported on Final Return (Pd. Ended 8/31/90) - Not Paid	747.65
Tax Due on Purchases	<u>10,675.50</u>
Total Tax Due	\$36,831.76

Following a second BCMS conference on April 28, 1993, other adjustments were made resulting in a further revision of the assessment to \$34,483.61. A Conciliation Order was issued on June 25, 1993 which revised the statutory notices in accordance with this adjustment.

The assessment herein revised pursuant to the Conciliation Order asserts tax due for the final three sales tax quarters of the audit period as follows:

<u>Period Ended</u>	<u>Revised Tax Due</u>
5/31/90	\$2,513.22
8/31/90	1,183.28
11/30/90	-0-

Petitioner presented no evidence at hearing to refute the Division's audit computations.

The tax due on the purchases component of the adjusted assessment results from the Division's review of records of capital improvements purchases. Such records provided no breakdown as to what portion of such purchases constituted materials purchases. The Division estimated that 30% of the total of the capital improvements purchases constituted purchases of materials and assessed tax on this 30%. This 30% materials estimate was based on the auditor's experience. Except for this tax assessed with respect to purchases, the other components of the revised assessment are based upon a review of records provided by petitioner and are not estimated.

The business which had been located at 1206 Second Avenue, New York, New York (see, Finding of Fact "4") was involved in the sale of furniture. This business also may have manufactured furniture. There is some disagreement among the parties and confusion in the record regarding the name and form of the entity which conducted this furniture business. The Division's records indicate a sales tax vendor registration in the name of "WCD, Inc./Woodex Designs" at the 1206 Second Avenue address with a Federal employer identification number of 13-3354277. Sales tax returns were filed under this name and this employer identification number during the period at issue.

Petitioner introduced into the record the 1987 and 1988 New York S corporation information reports (Form CT-3S) of "WCD, Inc.", a New York corporation. These reports

indicated an employer identification number of 13-3354277 and a date of commencing business in New York of July 9, 1986. The reports further indicate WCD, Inc.'s principal business activity as "investment" and that WCD had no income for either 1987 or 1988. The reports also indicated that Marvin Hammerman was the president and sole shareholder of WCD, Inc.

Petitioner also entered into the record a copy of a partnership agreement dated July 9, 1986 pursuant to which WCD, Inc. and Rachid Chamoun agreed to conduct business as a partnership under the name "Woodex Designs". The agreement indicated as the purpose of the partnership "to own and operate a store for the sale at retail of fine furniture" The partnership agreement further provided that net profits and losses would be divided 60% to WCD, Inc. and 40% to Rachid Chamoun.

The partnership, Woodex Designs, filed a Business Certificate for Partners in the County of New York on July 10, 1986.

Petitioner also submitted into evidence the 1986 and 1988 U.S. partnership returns of "Woodex Custom Design" (Form 1065). These returns indicated that the partnership started business on July 9, 1986 and that its principal business activity was furniture sales. These returns list an employer identification number of 13-3377916. The returns further indicate partnership interests of 60% to WCD, Inc. and 40% to Rachid Chamoun. The 1988 return indicates gross sales of \$643,746.00.

Petitioner also introduced into the record WCD, Inc.'s 1987 Schedule K-1 filed in respect of WCD's partnership interest in Woodex Custom Designs. This Schedule K-1 indicated a 60% partnership interest for WCD, Inc. and also indicated that WCD, Inc. materially participated in the business activity of the partnership. The K-1 further listed employer identifying numbers of 13-3354277 for WCD, Inc. and 13-3377916 for Woodex Custom Designs.

The Division introduced into the record the sales and use tax return (Form ST-102) for the period December 1, 1989 through February 28, 1990 filed by "WCD, Inc./Woodex Designs". The return bore a preaddressed label listing an address of "WCD, Inc./Woodex

Designs, 1206 2nd Ave., New York, New York 10021" and a preprinted identification number of 13-3354277. On the return, this identification number has been lined out in blue ink and above it has been written, also in blue ink, the number 13-3377916. Below the mailing label has been written in green ink 13-3354277. The blue ink used to make the noted changes in the preprinted information is clearly the same hand and ink used to write the various sales information listed on the return. The return is dated March 20, 1990 and is signed by Marvin Hammerman, as president.

The partnership agreement of Woodex Designs provided, in part, the following with respect to the control and operation of the partnership:

"(a) Chamoun shall have control and management of the day-to-day operation of the Store, provided, however, that until the payment of the Inventory Purchase Price,¹ he shall be subject in all respects to the authority of WCD.

"(b) Except for the day-to-day operation of the Store, the Partners shall have equal voice in the operation of the Partnership and neither Partner shall act without the approval of the other in any material matter, provided, however that until the Inventory Purchase Price shall be fully paid, WCD shall have final authority on all Partnership matters.

"(c) The Partners shall have the specific rights and powers required for or appropriate for the supervision of the business of the Partnership. Such rights and powers shall include, but not be limited to, the following:

"(1) To employ persons in the operation and management of the Partnership business;

"(2) To place title to or the right to use Partnership assets in the name of the Partnership or a nominee;

"(3) To borrow money . . . on such terms and in such amounts as the Partners shall deem in their absolute discretion to be in the best interest of the Partnership;

"(4) To purchase . . . or sell all or part of the Partnership assets at such price . . . and upon such terms as the Partners in their absolute discretion shall deem

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The inventory purchase price is defined in the partnership agreement as the price paid for the initial inventory of the store. The agreement sets the due date for the payment of this purchase price as the third anniversary of the opening of the store. The record herein provides no evidence of payment of the inventory purchase price.

to be in the best interest of the Partnership;

"(5) To negotiate and execute leases . . . upon such terms as the Partners in their absolute discretion shall deem to be in the best interests of the Partnership; and

"(6) To develop additional or replacement lines of business for the Partnership."

Petitioner, Marvin Hammerman, did not personally appear at the hearing. An affidavit of Mr. Hammerman was submitted in the record and stated, in relevant part:

"2. I have no knowledge of any business entity known as 'WCD, Inc./Woodex Designs.'"

"3. I am not now nor have I ever been either a partner or an employee of WCD, Inc./Woodex Designs.

"4. I am not now nor have I ever been either a partner or an employee of Woodex Designs."

There is no evidence in the record that any sales tax returns were filed during the period at issue under the name Woodex Designs (or Woodex Custom Designs) or using the Federal identification number 13-3377916.

There is no evidence in the record that, prior to the hearing in this matter, the Division was ever notified by Form DTF-95, Change of Business Information for Employers/Vendors, or by any other means that the name WCD, Inc./Woodex Designs and the identification number 13-3354277 were in any way inaccurate or erroneous.

CONCLUSIONS OF LAW

A. The Division made a clear and unequivocal request for the books and records of WCD, Inc./Woodex Designs by its audit appointment letters dated December 28, 1990 and January 16, 1991 (see, Tax Law § 1135[a][1]; Matter of M & B Appliance, Tax Appeals Tribunal, April 9, 1992). Since WCD, Inc./Woodex Designs failed to respond to this request, the Division was authorized to estimate the tax liability of WCD, Inc./Woodex Designs by a method reasonably calculated to reflect tax due (see, Tax Law §§ 1135[d], 1138[a][1]; Matter of Continental Arms Corp. v. State Tax Commn., 72 NY2d 976, 534 NYS2d 362). Moreover, given the lack of any response to the Division's appointment letters and the fact that the

business was apparently no longer in operation at the time of the audit, the Division's initial audit method for the period December 1, 1987 through February 28, 1990, which amounted to a disallowance of all claimed exempt sales, was proper (see, Matter of Tango Boutique, Tax Appeals Tribunal, April 28, 1994).

B. The Division's right to estimate the sales tax liability as noted is limited to the extent that the record must contain sufficient evidence to allow the trier of fact to determine whether the audit method was rational (see, Matter of Basileo, Tax Appeals Tribunal, May 9, 1991). The Division has articulated no rationale for its initial determination of tax due for the final three sales tax quarters of the audit period. The assessment for these three quarters, as revised (see, Finding of Fact "12"), must therefore be cancelled (see, Matter of Grecian Square v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221).

C. Having determined that the Division's use of an estimated audit method for the period December 1, 1987 through February 28, 1990 in its initial audit of WCD, Inc./Woodex Designs was proper and that the specific methodology used was reasonable under the circumstances, petitioner had the burden of proving error in the audit method or result (see, Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679).

D. Petitioner offered no evidence to refute the Division's audit computations, as revised. Accordingly, except with respect to the period March 1, 1990 through November 30, 1990 (see, Conclusion of Law "B"), such computations are sustained.

E. Petitioner argued that tax due on materials purchases (see, Finding of Fact "14") was improper because this component of the revised assessment was based in part on audit experience.² This contention is rejected. The records reviewed by the Division with respect to the capital improvements purchases provided no breakdown as to what portion of such purchases constituted purchases of materials used in such capital improvements. Furthermore, petitioner presented no proof at hearing to show that this estimate was improper. It is

²It is noted that, except for the tax due on purchases component, the assessment herein, as revised, is not based on any estimates whatever.

concluded, therefore, that the Division's estimate was reasonable.

F. That petitioner eventually produced certain records in or about September 1992, some 21 months following the Division's initial request and some 20 months following the issuance of the statutory notices herein, does not, of course, change the result herein. Tax Law § 1135(d) requires that a

taxpayer produce records upon demand by the Division. Here, no records were produced in response to the Division's requests. Consequently, as discussed above, the Division was authorized to estimate the tax liability of WCD, Inc./Woodex Designs.

G. Pursuant to Tax Law § 1133(a), all persons required to collect any tax imposed by Tax Law Article 28 are "personally liable for the tax imposed, collected or required to be collected under [Article 28]."

H. Tax Law § 1131(former [1]) defines "person required to collect tax" as including, inter alia:

"every vendor of tangible personal property or services Said terms shall also include any officer, director or employee of a corporation . . . [or] any employee of a partnership . . . who as such officer, director or employee is under a duty to act for such corporation [or] partnership . . . in complying with any requirement of this article; and any member of a partnership."

I. Petitioner contends that the taxpayer audited herein by the Division was Woodex Designs, a partnership. Since petitioner was neither an employee nor a partner of Woodex Designs, petitioner argues that he cannot be personally liable under Tax Law §§ 1131(1) and 1133(a) for sales and use taxes owed by Woodex Designs.

J. Petitioner's contention is rejected. While the fact that a sales tax registration and sales tax returns were filed in the name of WCD, Inc./Woodex Designs bearing WCD, Inc.'s employer identification number does create a certain obfuscatory effect, the result dictated by the instant circumstances is clear.

The record in this matter shows that the partnership, Woodex Designs, was the entity engaged in the furniture business described herein. Accordingly, Woodex Designs was a

"vendor" as defined by Tax Law § 1101(a)(8)³ and was therefore a person required to collect tax under Tax Law § 1131(1). As a member of the partnership, WCD, Inc. was also, by statutory definition, such a person (see, Tax Law § 1131[1]; Matter of Martin, State Tax Commn., August 12, 1987).

Petitioner's argument notwithstanding, the analysis does not end there. As plainly stated in the statute, the term "person required to collect tax" also includes corporate officers who are under a duty to act for the corporation in complying with any requirements of Article 28. As the 100% shareholder and president of the S corporation, WCD, Inc., and in the absence of any evidence to the contrary, petitioner was clearly under such a duty with respect to WCD, Inc. (see, Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536; Matter of Rotondo, Tax Appeals Tribunal, August 18, 1994). Since, as noted above, WCD, Inc. was a person responsible to collect tax on behalf of Woodex Designs, the Division's assertion of personal liability against petitioner, a responsible officer of WCD, Inc., for the sales tax liability of Woodex Designs was proper.

K. It is noted that petitioner's contention, as stated in his brief, that the Tax Law must be strictly construed is not disputed. The analysis

herein is based upon the plain meaning of the words contained in Tax Law §§ 1131(1) and 1133(a) and is therefore in accord with the principle of strict construction as urged by petitioner (see, Debevoise & Plimpton v. New York State Dept. of Taxation & Fin., 80 NY2d 657, 593 NYS2d 974).

³Tax Law § 1101(a)(8)(i) includes within the definition of vendor the following:

"(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

"(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article"

L. Even if the foregoing analysis was determined to be incorrect, the Division's assertion of liability against petitioner was nonetheless proper. A sales tax registration and sales and use tax returns were filed by "WCD, Inc./Woodex Designs" using the Federal identification number assigned to WCD, Inc. WCD, Inc. thus registered as a vendor for sales tax purposes and filed returns throughout the period at issue accordingly. Having so registered, WCD, Inc. assumed all of the obligations of a person responsible to collect tax on behalf of Woodex Designs (see, Franklin Mint Corp. v. Tully, 94 AD2d 877, 463 NYS2d 566, affd 61 NY2d 980, 475 NYS2d 280; see also, 20 NYCRR 539.2[k]; 20 NYCRR former 539.2[j]; 20 NYCRR former 533.1[a][8]). Since WCD, Inc. was a vendor with respect to the sales made by Woodex Designs, it follows that petitioner, a responsible officer of WCD, Inc. (see, Conclusion of Law "J"), was personally liable for the sales tax liability of Woodex Designs.

M. The petition of Marvin Hammerman, officer of WCD, Inc./Woodex Designs, is granted to the extent of Conclusion of Law "B" and the notices of determination and demands for payment of sales and use taxes due dated January 28, 1991 are to be modified accordingly and in accordance with the Conciliation Order dated June 25, 1993. The petition is in all other respects denied.

DATED: Troy, New York
December 15, 1994

/s/ Timothy J. Alston
ADMINISTRATIVE LAW JUDGE